**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.**

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**J U D G M E N T**

Mangla Ram VS. Sital Dass & Ors.

S.B. CIVIL MISC.APPEAL NO.255/2004 AGAINST THE JUDGMENT DATED 7.4.2003 PASSED BY DISTRICT JUDGE, PALI SHRI MURLIDHAR VESHNAV IN CIVIL MISC CASE NO.37/2000

**REPORTABLE**

DATE OF JUDGMENT : 2nd August, 2004

**PRESENT**

**HON'BLE MR. JUSTICE PRAKASH TATIA**

Mr.Vijay Bishnoi, for the appellant.
Mr.Sangeet Lodha ]
Mr.Dinesh Maheshwari ], for the respondents.

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**BY THE COURT**:

1. Appellant-defendant no. 1 Mangla Ram has preferred this appeal under Section 46(1) of the Rajasthan Municipalities Act, 1959 (here in after referred as Act of 1959) against the judgment dated 7th April, 2003 passed by the learned District Judge, Pali. The learned District Judge, Pali vide judgment dated 7th April, 2003 allowed the election petition filed by the respondent no.1-plaintiff Shital Das against the

appellant-defendant no.1 and set aside the election of appellant, declaring him, ward member for ward no.10 of Municipal Council, Pali. After setting aside the election of the appellant, the court below also declared plaintiff-respondent no.1 as elected ward member for the ward no.10 of Pali Municipal Council.

2. Brief facts of the case are that election for the ward members for Municipal Council, Pali were held on 26th Nov., 1999. Counting took place on 27th Nov., 1999. The appellant was declared elected by margin of one vote only. The respondent no.1 challenged the election petition of the appellant by filing election petition under Section 34 of the Act of 1959. Election of the appellant was principally challenged on two grounds. *First ground* is that one of the children of the appellant born after 27th Nov. 1995 and before that date appellant already had more than two children. As per clause (xiv) of Sec. 26 read with proviso (e) of Act of 1959, a person who has more than two children and one is born after 27th No. 1995 then such person incurs disqualification to contest the municipal election. *Second ground* is that, when appellant and the respondent no. 1, both secured equal votes then the respondent no. 1 submitted application for recounting of the votes upon which the returning officer ordered recounting of the votes of the appellant and respondent no. 1

*only* but after recounting, one of the vote of another candidate Amba Lal was counted in favour of appellant and he was declared elected by margin of only one vote. There were other grounds also, but those grounds were not pressed by the respondent no.1-plaintiff before the court below.

3. The issues framed by the court below were; (i) whether the non-petitioners-appellants' nomination was wrongly and illegally accepted, (ii) whether the election for the ward no.10 of the Municipal Council, Pali was conducted in violation to the Rules and, therefore, they are invalid, (iii) whether the defendant no.1 was illegally allotted election symbol of Indian National Congress and it affected the election materially, (iv) whether the votes were wrongly counted and defendant no.1 was illegally declared elected and lastly, (v) whether the plaintiff is entitled to be declared as elected member of the ward no.10 of the Municipal Council, Pali.

4. In support of his case the plaintiff gave his statement on oath as AW-1 and produced witnesses AW-2 Rajendra Kumar Bhati, AW-3 Santosh and AW-4 Mangu Singh Dudawat. The plaintiff produced documentary evidence also. EX.1 and Ex.2 are the copies of declaration, submitted by the defendant-appellant

Mangla Ram for his children, before the Returning Officer, Ex.3 is the copy of nomination form of said Mangla Ram, Ex.4 is the copy of objections submitted by defendant no.3 Amba Lal against the candidature of the Mangla Ram's candidature, Ex.5 is the another objection filed by Amba Lal and Ex.6 is the copy of the affidavit of Amba Lal. The plaintiff further submitted Ex.7, copy of the certificate obtained from the school to show that plaintiff's four children were admitted in the school at Pali, Ex.8 is the copy of the objection submitted by one Mangu Singh Dudawat before the Returning Officer raising objection against the candidature of candidate Mangla Ram on the ground of his having total five children, Ex.9 is copy of the affidavit of said Mangu Singh Dudawat, Ex.10 is the copy of the order passed by the returning officer, Ex.11 is the copy of the counting check memo dated 27th Nov., 1999 for round no.1 of counting, Ex.12 is the copy of counting memo for round no.2, Ex.13 is the copy of the application submitted by the plaintiff for recounting of the votes, Ex.14 is the order for recounting passed by the returning officer, Ex.15 is the another application for recounting of votes, Ex.16 is the copy of the declaration of result, Ex.17 is the copy of the final result sheet and Ex.18 is the survey report conducted by the Mahila and Bal Vikas Vibhag.

5. The appellant defendant himself gave statement on oath as DW-1 before the trial court and produced witnesses DW-2 Shankar Singh and DW-3 Ganpat Ram.

6. It will be worthwhile to mention here that the trial court suo motu raised a question at the time of final arguments that whether all votes, valid, invalid and tender votes are required to be recounted. The plaintiff opposed the recounting of the votes whereas the defendant had no objection if recounting is ordered. The trial court influenced by the difference of only one vote between plaintiff and defendant and in view of the fact that plaintiff himself made request for recounting before the Returning Officer, (though opposed before the trial court itself), ordered recounting of all votes. This suo motu order for recounting of the trial court dated 8.10.2002 was challenged by defendant by filing writ petition (S.B. Civil writ petition No.4137/2002), which was allowed by this court by order dated 17th Dec., 2002 and the order of recounting was set aside by this court.

7. The trial court after evidence and opportunity of hearing to both the parties held that defendant had five children and at the time of filing of nomination paper he had one child born after 27th Nov., 1995,

which was the cut out date and, therefore, the appellant was disqualified to contest the election and his nomination paper was wrongly accepted by the Returning Officer. The issues no.2 and 3 about the election being in violation of rules and wrong allotment of election symbol to the returned candidate were not pressed by the plaintiff, therefore, decided against the plaintiff-respondent no.1. The court below further held that when in first counting plaintiff Shital Dass secured 452 votes and returned candidate-appellant secured only 451 votes then the plaintiff Shital Dass should have been declared elected, by not doing so, the returning officer committed error in counting and declaring appellant as elected and consequentially, the trial court decided issue no.5 in favour of the plaintiff and declared him as elected ward member from ward no.10 of the Municipal Council, Pali.

8. Being aggrieved against the judgment of the court below, the appellant returned candidate challenged the judgment of the trial court in this appeal.

9. First of all learned counsel for the appellant submitted that in view of the settled law and as held by the Hon'ble Apex Court in the case of Prakash Khandre Vs. Dr. Vijay Kumar Khandre & Ors. reported in (2002) 5 SCC 568 where there are more than two

candidates for one seat and the elected candidate subsequently found to be disqualified, the candidate who secured more votes than the remaining candidates cannot be declared as elected as votes cast in favour of the disqualified candidate cannot be regarded as thrown away, nor can it be presumed that those votes would have been secured by the next candidate who secured more votes. The Hon'ble Apex Court further held that it cannot be predicted as to in whose favour the voters would have voted if they were aware that the elected candidate was disqualified. The proposition laid down by the Hon'ble Apex Court fully applies to the facts of this case and learned counsel for the respondent Shri. Sangeet Lodha could not seriously dispute this proposition. Therefore, the part of the finding so far as declaration of respondent no.1 as elected candidate by the court below is liable to be set aside, hence, set aside and issue no.5 is decided against the plaintiff-respondent no.1 in view of the said judgment delivered in the case of Prakash Khandre Vs. Dr.Vijay Kumar Khandre & Ors. (supra).

10. Learned counsel for the appellant returned candidate vehemently submitted that the court below exceeded its jurisdiction in deciding issue no.1 in favour of the plaintiff-respondent no.1. According to learned counsel for the appellant in the election petition,

the plaintiff is required to plead all the facts on the basis of which he wants to challenge the election of the returned candidate. Learned counsel for the appellant vehemently submitted that since there was no sufficient pleading about the birth of any of the child of the appellant after cut out date, i.e., 27th Nov., 1995, therefore, the trial court did not frame an issue that whether any of the child of the appellant born after 27th Nov., 1995. Learned counsel for the appellant further submitted that though there was only one issue and it was also vague, still the trial court divided the issue in two parts whereas the said issue could not have been bifurcated in two parts. The trial court under assumption that issue no.1 has two parts while deciding issue no.1 specifically held that second part of the issue; one of the child born to the appellant after the cut out date, decided the issue against the appellant and declared that one of the child of the appellant born after 27th Nov., 1995. According to learned counsel for the appellant because of lack of pleading and because of non-framing of proper issue finding recorded against the appellant vitiated. Learned counsel for the appellant relied upon the judgment delivered in the case of Nedunuri Kameswaramma Vs. Sampati Subba Rao reported in AIR 1963 (SC) 884 in support of his plea that omission to frame issue vitiates the proceedings.

11. On merit of the issue no.1, learned counsel for the appellant submitted that assuming for the sake of arguments that the court could have gone into the issue of birth of any child of the appellant then it was the duty cast upon the plaintiff respondent no.1 to prove the issue of fact by producing evidence. In this case, according to learned counsel for the appellant, there arose no occasion for appellant to rebut the allegation of birth of the child of the appellant after cut out date as the plaintiff failed to discharge his burden of proving the fact demanding any rebuttal from the appellant. It is also submitted that the court below committed serious error of law and ignored the settled law about proving a fact in court of law and, therefore, the finding of the trial court on issue no.1 factually wrong and illegal, cannot be sustained.

12. Learned counsel for the appellant-defendant elected candidate vehemently submitted that even if evidence produced by the appellant-defendant is ignored, still election petition was liable to be dismissed as there is no iota of evidence on record to prove that appellant had two or more children before cut out date and any more children born to the appellant after the cut out date. Learned counsel for the appellant heavily relied upon the judgment of the

Hon'ble Apex Court delivered in the case of Birad Mal Singhvi Vs. Anand Purohit reported in AIR 1988 SC 1796 and one judgment of this court (by me) delivered in S.B. Civil writ petition No.4553/2002-Lala Ram Vs. Civil Judge (Sr.Div.), Jodhpur.

13. With equal force and vehemence, learned counsel for the appellant submitted that the issue no.4 has also been decided wrongly by the court below as the court below failed to appreciate even the facts of the case and proceeded on wrong assumptions. According to learned counsel for the appellant, the learned trial court absolutely erroneously proceeded on assumption that after complete counting of the votes plaintiff-respondent secured 452 votes and defendant-appellant secured 451 votes. According to learned counsel for the appellant, there was no reason for court below to proceed on this assumption, except due to mis-reading of not only evidence of both the parties and further because of mis-reading of Ex.11, which is the counting check memo sheet for round no.1 only and not the sheet of final vote counting and court below’s mistake is also because Ex.12, vote counting sheet for second round, must have escaped the notice of the court.

14. In reply, learned counsel for the plaintiff-respondent no.1 vehemently submitted that plaintiff

clearly pleaded his case about the disqualification of the appellant in contesting the election on the ground of birth of one child to him after the cut out date. The plaintiff in pleadings referred the documents Ex.4 to Ex.9, which were submitted before the Returning Officer in which objection has been raised by defendant Amba Lal and one Mangu Singh Dudawat against the candidature of the appellant on the ground of his having disqualification under Clause (XIV) of Section 26 of the Act of 1959. The plaintiff after relying on those documents specifically in the plaint at page no.4 submitted that defendant no.2 raised objection that appellant-defendant no.1 has total five children, out of which three born after 1992 and youngest issue of defendant no.1 was of the age of 1 ½ years only at the time of filling of the nomination, which makes the plea of the plaintiff absolutely clear. It is also submitted that issue no.1 was framed by the trial court only on this plea of the plaintiff respondent. It is also submitted that, in fact, there is no specific denial of the fact by the appellant in his written statement and the appellant even did not produce his wife, who was the best witness to disprove the allegations. Non-production of this material witness by the appellant clearly shows that in case she would have been produced as witness she would have given true and correct statement on the fact in issue and which

would have gone against the appellant. It is also submitted that the plaintiff had personal knowledge about the number of the children of the appellant and also has knowledge about the timings of their birth. The plaintiff also produced independent witnesses and not only independent witnesses but one of them, is supporter of the appellant's political party and he is AW-4 Mangu Singh Dudawat.

15. It is also submitted that plaintiff proved, as a matter of fact, that counting was not properly conducted and not only this, but the recounting was conducted in violation to the order passed by the returning officer himself and in the back of the even elected contesting candidates. It is also submitted that if what has been ordered by the returning officer in the order for recounting would have been adhered to then also result would have remained same, equal votes for plaintiff and defendant and defendant could not have been declared elected. Therefore, according to learned counsel for the plaintiff-respondent that if the reasons given by the trial court on one point may not found to be sufficient for deciding issue no.4 in favour of the plaintiff, still appellant could not point out any error of fact or illegality in the finding of the trial court that the appellant defendant was illegally declared elected by the returning officer after illegally adding one vote

of the another candidate Amba Lal in the votes of defendant-appellant. Therefore, appeal of the appellant is liable to be dismissed. It is also submitted that in the light of finding of the trial court that one vote wrongly added in favour of the defendant and if this addition is ignored then plaintiff and defendant both secured equal votes, therefore also, declaration of the Returning Officer declaring appellant-defendant elected is void. In such a situation the Returning Officer could have drawn lot for plaintiff and defendant as per sub-clause (a) of sub-sec. (7) of Section 44 of the Act of 1959. It is also submitted that in case plaintiff can not be declared elected and it is held that both, plaintiff and defendant secured equal votes then this court may draw lot between plaintiff and defendant as per sub-clause (b) of sub-sec. (7) of Section 44 of the Act of 1959.

16. Learned counsel for the appellant also cited judgments of the Hon'ble Apex court delivered in the case of Chanda Singh Vs. Ch.Shiv Ram Varma & Ors reported in AIR 1975 (SC) 404, S.Baldev Singh Vs. Teja Singh Swatantra (Dead) & Ors reported in AIR 1975 (SC) 693, V.S. Achuthanandan Vs. P.J.Francis & Anr. reported in (2001) 3 SCC 81, Ananga Uday Singh Deo Vs. Ranga Nath Mishra & Ors. reported in (2002) 1

SCC 499, Mahendra Pal Vs. Ram Dass Malanger & Ors. reported in (2002) 3 SCC 457, P.H.Pujar Vs. Kanthi Rajashekhar Kidiyappa & Ors. reported in (2002) 3 SCC 742 and Mahender Pratap Vs. Krishan Pal & Ors. reported in (2003) 1 SCC 390. These authorities are on the issue relating to the situation in which the recounting can or cannot be ordered by the court. Hon'ble Supreme court the case P.K.K.Shamsudeen Vs. K.A.M. Mappillai Mohindeen and others (AIR 1989 SC 640) set aside the election tribunal’s order for recounting even after it was found that the candidate declared elected in fact secured 528 votes only as against 649 he was originally held to have secured and petitioner secured 556. The Supreme Court set aside the order of recounting passed by the election tribunal as there was no factual foundation laid down for recounting by the petitioner in the election petition. In this case also neither any factual foundation was laid down by the plaintiff in the pleadings nor there was any prayer of the plaintiff in the election petition for recounting of vote rather plaintiff himself opposed the recounting of the votes before the trial court, which is clear from the order of the trial court dated 8.10.2002. This court has already set aside the court below’s order for recounting by order dated 17.12.2002. Therefore, in the facts of this case there arises no question for recounting of the votes.

17. I considered the rival submissions and perused the record.

18. On merit, first of all it is to be seen whether the trial court recorded the finding about defendant's children against the defendant-appellant without there being any pleading or recorded the findings without *sufficient* pleadings? Whether the court below had not framed the proper issue on this point and issue as framed by the court below caused prejudice to the defendant-appellant?

19. After going through the pleading in the election petition and entire record, I found the plaintiff in his election petition pleaded that one Amba Lal (defendant no. 1) and one Mangu Lal submitted written objections before the returning officer that defendant- appellant is disqualified to contest election as he has five children and one was born after cut out date. Plaintiff also placed on record the copies of those objections. Plaintiff also pleaded that one of the child was of the age of 1-1/2 years only at the time of submitting nomination by the defendant, therefore, defendant was disqualified to contest the election. A plain and simple reading of the election petition itself makes clear the ground for challenge to the validity of the

petitioner's nomination paper. I do not find pleadings as insufficient or vague.

20. Not only above but in fact both the parties proceeded with the trial of the election petition knowing it well that what the plaintiff pleaded and what were the grounds for challenge to the election of the petitioner. Defendant was fully aware from the pleadings of the plaintiff about factual foundation laid down by the plaintiff in his election petition and also had full knowledge of specific issue raised by the plaintiff, including the allegation, of his having more children than two, with birth of one child after the cut out date, i.e., 27th Nov., 1995. Both the parties led evidence on this issue and argued the matter before the court below without there being any objection about the lack of the pleading in the election petition filed by the respondent no.1-plaintiff. It is true that learned court below framed the issues in wider language rather than framing the issue in very specific language, but this neither created any confusion nor any doubt in mind of both the contesting parties, therefore, the objection of learned counsel for the appellant about the lack of the pleading is factually wrong and finding recorded by the court below on this issue cannot be set aside on the ground of lack of pleading or on the ground of not framing the issue in

proper language.

21. It appears that plaintiff pleaded that the Returning Officer accepted the defendant-appellant's nomination paper by passing interim order only (as word *Philhal* is used in the order of Returning Officer accepting defendant's nomination paper) and without finally deciding the objection, therefore, it is wrong acceptance of defendant's nomination paper by the Returning Officer. Other ground in election petition, as stated above is disqualification of the defendant under clause (xiv) of Sec. 26 Act of 1959. The trial court framed one issue only and which is that whether defendant's nomination was wrongly accepted by the Returning Officer?

22. The trial court examined plaintiff's above both the pleas while deciding issue no.1. Since both the points were relating to the validity of candidature of the defendant, therefore the trial court appears to have framed the issue no.1 in wider form so as cover two grounds in one issue. In these facts, both the grounds could have been decided by the trial court only while deciding issue no.1, which is relating to the wrongful acceptance of defendant's nomination paper. The trial court if framed an issue in wider form and decided the issue point-wise then

the court has acted in better way only while deciding the issue. If there is no issue at all and prejudice has been caused to a party then the aggrieved party can have objection for not framing the issue. If issue is not framed properly and because of this the party was misled to reasonably believe that issue was abandoned by the party alleging it and has not cross examined the party alleging and his witnesses and prevented from giving evidence and did not produce his evidence because of this reason then he may raise grievance. In this case the issue framed by the trial court can not be said to be “not properly framed issue”.

23. The trial court decided the issue about the children of the defendant as an issue of fact for which the defendant was given full opportunity to meet with and the defendant-appellant availed that opportunity. The trial court has not set aside the election of the defendant on the ground that the Returning Officer had not decided the objection of the objector finally. It was more a legal ground only. I perused the said order of the returning officer by which defendant’s nomination paper was accepted, which is also quoted at page no.8 of the judgment of the trial court. The Returning Officer specifically recorded finding that objector could not prove that applicant (appellant) has faced any sentence in case

No.CR.62/1999 registered under the NDPS Act. The returning officer, thereafter, by speaking order recorded its satisfaction that objector could not prove that children of the appellant born after 27th Nov., 1995 and, thereafter, passed the order 'at present nomination is accepted'. It appears that word "*Philhal*" (at present) in the order of the Returning Officer is superfluous word and appears to have been used unnecessarily in the order because the returning officer before writing so, clearly held that the objector failed to prove the allegation leveled by him about disqualification of the appellant.

24. One of the point on which the election of the appellant was set aside is the issue whether the appellant was disqualified as his one of the children born after 27th Nov., 1995. For this, the trial court relied upon the oral as well as documentary evidence produced by the plaintiff-respondent no.1.

25. It will be worthwhile to first consider the documentary evidence produced by the plaintiff-respondent no.1. Ex.1 is the first declaration form submitted by the defendant-appellant before the returning officer, on 13th Nov., 1999. In this declaration form, the appellant declared that he has

two daughters; Miss Mamta and Miss. Tara. Their dates of birth are; 10th July, 1989 and 10th July, 1991 respectively. Thereafter, he wrote that after the year 1991 no issue born to him. In next column where the candidate was required to declare about his any children born in between 28th Nov., 1992 to 27th Nov., 1995, the defendant-appellant wrote "NO". Thereafter, in the column about any children born after 28th Nov., 1995, the appellant wrote "NO". In Ex.2, the second declaration form submitted by the defendant-appellant on 16th Nov., 1999 also, the defendant declared names of his same two daughters only, but declared Miss Tara's date of birth 10th July, 1997 in place of 19th July, 1991 and wrote that after the year 1997, no children born to him. With the help of these documents, learned counsel for the respondent asserted that birth of Miss Tara on 10th July, 1997 is an admitted fact and this admission is signed and verified by none else than the appellant himself, hence, birth of one child in the year 1997 is a proved fact from the undisputed and admitted document of the appellant.

26. Another documents which are relied upon by the plaintiff includes the certificate Ex.7, issued by the Sadhana Vidhya Mandir, Pali. It is alleged that the in this school defendant's daughters were admitted for studies. In this certificate Ex.7, date

of birth of Mamta and Tara has been shown as 10th July, 1989 and 10th July, 1991. Ex. 5 is the copy of the application, which was submitted by the one of the candidates Amba Lal before the Returning Officer on 17th Nov., 1999 wherein Amba Lal alleged that defendant has four children, Mamta, Tara, Pintu and Sukhiya. The date of birth of Mamta and Tara is the same as mentioned in Ex.1, i.e., 10th July, 1989 and 10th July, 1991. It is said that above information was obtained from the school record where the appellant's children were studying. It is also submitted that in addition to above four children there is one more child named Bhanwar, who was of the age of 1 ½ year. This application is supported by the affidavit of Amba Lal (Ex.6.).

27. So far as Mamta and Tara who are the daughters of the appellant is concerned, there is no dispute. The appellant in his declaration form Ex.1 disclosed the date of birth of Mamta and Tara 10th July, 1989 and 10th July, 1991. The same is the position in the documents relied upon by the plaintiff-respondent no.1 himself when he relied upon the Ex.5, Ex.6 and Ex.7. So far birth of Tara in the year 1991 is concerned, the plaintiff has not stated in his statement to be wrong. In fact plaintiff relied upon Ex. 5, 6, and 7 and plaintiff’s these documents also

prove that correct year of birth of Tara is 1991 and not 1997. Even if defendant's daughter Tara is held to have born in the year 1997, after 27th Nov. 1995, still it is not a disqualification for the defendant to contest the election in question because she remains only second daughter of the defendant whereas disqualification as per the Clause (xiv) read with proviso (e) of Section 26 of the Act of 1959 is birth of next child after 25th Nov. 1995 to a person who had two children born before 25th Nov. 1995. Tara is the second daughter of the defendant is the case pleaded by the plaintiff himself. Ex. 1 and Ex. 2 can be used against defendant to prove that he admitted that he has two daughters, Mamta and Tara. Further, the defendants admission in Ex. 2 that Tara was born on 10th July 1997 can be used against the defendant but as stated above mere proving that one of children was born to the defendant after 27th Nov. 1995 without proving that he already had two or more children before 27th Nov. 1995 is of no consequence.

28. Ex. 5 is the copy of the objection submitted by one of the candidate Amba Lal. Ex. 5 and supporting affidavit of Amba Lal. Ex. 6 is Amba Lal's affidavit in support of Ex.5. Ex.8 is objection submitted by the Manghu Singh before the returning officer and Ex. 9 is affidavit in support of Ex.8. Independently Ex.5, 6, 8 and 9 are no proof of the fact of birth of

any children of the defendant Mangla Ram. They are proof of the fact that Amba Lal and Mangh Singh raised the same objection before Returning Officer at the time of scrutiny of nomination papers which the plaintiff wants to prove in this election petition. Amba Lal did not appear in witness box to give evidence. Manghu Singh appeared as defendant's witness. His evidence will be considered at relevant place.

29. Amba Lal did not appear to give evidence in court and his affidavit cannot be accepted as evidence to prove the fact mentioned in the affidavit. Even otherwise if facts mentioned Amba Lal's objection petition Ex.5 and affidavit Ex.6 then, if not only, then one of the source of knowledge of the date of birth of defendant's children to Amba Lal is the information gathered from the School only. What is evidentiary value of the certificate Ex. 7, issued by the school is of importance. Admission form of any of the children in original or it's copies have neither been produced nor were summoned by the plaintiff. None of the person from the school was called to prove the certificate Ex.7. In absence of admission form of the children named in the certificate Ex. 7 is of no help to the plaintiff. When plaintiff had knowledge about the fact that defendant's children are student of this particular school then

plaintiff’s non production of copies of the admission form of the said students and non summoning of the documents from the school casts serious doubt upon the credibility of the case of the plaintiff. Even the Ex. 7 certificate issued by the school is also not a reliable piece of evidence. In the school certificate Ex.7 only date of birth of Mamta and Tara is given and no date of birth of alleged children of appellant Pintu and Sukhiya has been given. Therefore, it appears that the school is not keeping the complete information about their student. Therefore, this certificate Ex.7 does not help the plaintiff for proving the fact of birth of any of the children of the appellant after cut out date.

30. A.W 4 Manghu Singh, in his complaint Ex. 8, stated that Mangla Ram has five children and three of children are born before 1992, one born in between the year 1994-1995 and one more born in between the year 1995-1999. This type of statement is liable to be rejected as the objector Mangu Singh Dudawat had no knowledge about even the year of birth of any of the children of the appellant till the time of filling objection. When Manghu Singh had no knowledge of the relevant fact till 17 Nov., 1997 which is proved from Manghu Singh’s admission in Ex.8, his statement in court that Mamta born in the year 1989, Tara in 1991, Chukiya in 1993, Pintu in 1995 and

Bhanwar born in the year 1997 cannot be believed.

31. In addition to above, there is one more document Ex.18, copy of one sheet alleged to have been prepared by Mahila Bal Vikas Vibhag of the Government of Rajasthan. This document is said to be a survey report about the family members of appellant. In this sheet, under the name of one Mangla Ram, his wife's name Lila and, thereafter, Mamta, Tara, Sukhiya, Pintu and Bhanwar have

32. been mentioned. Mamta, Tara, Sukhiya and Pintu have been shown as female in column for gender whereas Bhanwar has been shown as Male. The age of Mamta is given 8 years, Tara 7 years, Sukhiya 6 years, Pintu 4 years and for Bhanwar one year and six months. It will be worthwhile to consider the oral evidence produced by the plaintiff to prove this document Ex.18. AW-2 Rajendra Kumar Bhati is the officer of Bal Vikas Pariyojana. He stated that the employees of his department used to conduct the survey of the family members to find out about the children below the age of 6 years and pregnant ladies and in this process they collect details about family members and on the basis of that information entries are made in the register. Ex.18 is the copy of survey register wherein entries were made by employee Santosh Sharma. He further stated that in this sheet total five children of appellant have been shown, out of which

four are female and one is male. The youngest son of the appellant has been shown with age of one year and six months. This survey was conducted on 13th April, 1999. In cross-examination, AW-2 Rajendra Kumar Bhati admitted that there is no mention on the register when it was issued. It is also not mentioned that how many pages are in the register and when it was issued. It is also not mentioned, to whom this register was issued. He further admitted that it is also not mentioned in register for which Mohalla this register was issued. He also admitted that in Ex.18, there is no mention of Mohalla and House numbers. Therefore, it is clear that the A.W 3 Rajendra Kumar has no personal knowledge about the correctness of the facts mentioned in register Ex. 18 and in particular, years of birth of the children named in Ex. 18. In view of the statement of this witness it is unsafe to rely upon the register Ex. 18 as it was not a regularly kept register.

33. Since the register was said to be prepared on the basis of information collected by Santosh Sharma and she was produced by the plaintiff as AW-3, her statement become more important. She in her examination-in-chief stated that she conducted survey and made the entries in the sheet Ex.18. She stated that the entries are relating to the Nararam Choudhary's family. She further stated that

particulars about Mangla Ram’s children have been entered in this register. However, in examination-in-chief itself she stated that what has been recorded in register is recorded only on the basis of the information provided by a person, who was found in the house. She is not remembering who that person was. She admitted that she did not know Mangla Ram at that time. In examination-in-chief, she described the procedure how these entries are made. She admitted that for survey, they used to go to the house of the persons and they collect the information from any person, who may be available in the house and not only this, but she admitted that even the information can be collected from any person, who may be found outside the house. In cross-examination, she further said that the entries about Mangla Ram’s family were made on the basis of the information, which was supplied by one old lady, who was sitting outside the house. Who was that lady, she has no knowledge. After this, AW-1 Santosh even said that she had no knowledge whether she was member of that family or not. Nothing remains after the statement of AW-1 Santosh, when she admitted that she did not conduct any detail survey at the time of filling Ex.18. In view of the statement of the witness A.W.3 it is clear that information recorded have not been gathered for proper source, therefore, these entries do not prove that defendant has five children and one

born after cut out date.

34. The trial court observed that in Ex.2 under the column for furnishing information about the birth of any of the child during 18th Nov., 1982 to 27th Nov., 1995 nothing has been mentioned by the appellant. Defendant-appellant also wrote that after 1997 no issue born to him. Therefore, this indicates that issue must have born to appellant after 27th Nov., 1995. The reasoning given by the learned trial Judge appears to be based only on assumption and that too, without there being any justification for that assumption. The trial court failed in appreciating legal position of the proviso (e) of sub-clause (xiv) of sec. 26. Mere having one child before 27th Nov., 1995 and giving birth to a child after 27th Nov., 1995 only is of no consequence and it cannot be a ground to hold that appellant is disqualified to contest the election as per sub-clause (e) of clause (xiv) of Section 26 of the Act of 1959.

35. *In view of the above discussions, none of the documents produced by the plaintiff proves the fact that appellant had more than two children before the cut out date and any more child was born to him after the cut out date.*

36. For this issue there is oral evidence of AW-1 Shital Dass. He relied upon the documents referred above. In examination-in-chief, he stated that he himself obtained the information about Mangla Ram's children and this information he obtained was from the Mahila Bal Vikas Vibhag of the Government of Rajasthan. Since it has been found that the information with the Mahila Bal Vikas Vibhag itself are not from reliable source then very foundation goes. It will be worthwhile to mention here that the plaintiff himself did not submit any objection before the Returning Officer on this count. He relied upon the objection raised by those persons, who themselves raised the objection on the basis of information provided by the school authority or by the above mentioned department of Government of Rajasthan. Neither the school nor the Mahila Bal Vikas Vibhag had full information about the date of birth of children of the appellant, if appellant had more than two children.

37. The other oral evidence is of AW-4 Mangu Singh Dudawat. This witness Mangu Singh Dudawat submitted objection before the Returning Officer on 17th Nov., 1999 stating therein that three children born to appellant before 1992, one children born to the appellant in between the year 1992 to 1995 and thereafter, he gave birth to one more children in

between the years 1995 to 1999. Therefore, till 17th Nov., 1999, AW-4 had no knowledge about exact even year of the birth of any child. He did not disclose name of any of the children of the appellant in his objection Ex.8 supported by affidavit. However, in court he improved and said that appellant's eldest daughter Mamta was born in the year 1989, second daughter Tara born in the year 1991, third daughter Sukhiya born in the year 1993, fourth daughter Pintu born in the year 1995 and fifth son Bhanwar born in the year about 1997. He said that he is living only 10 houses away from the house of the appellant. He knows these facts because on the birth of son of the appellant, sweets were distributed and there was gathering (*Sabha*) and he also joined that gathering. He further stated that he is President of Rajeev Brigade and he submitted objection about candidature of Mangla Ram on the ground of his disqualification for having more than two children and he also submitted affidavit. In cross-examination, he admitted that when appellant Mangla Ram got the ticket from the Congress Party he did not support Mangla Ram and he remained at his house. He further stated that he also tried to get ticket from the Congress Party, but it was not given to him. However, he said that he was not annoyed with Mangla Ram for not getting the ticket from Congress Party. The oral statement of this witness, who had no good

relation with the appellant due to political reason for this very election despite the fact that he was supporter of the party of the appellant required to be considered carefully and if considered carefully and in the facts mentioned above, it is not safe to rely upon the statement of the AW-4 Mangu Singh Dudawat.

38. In view of the above discussion, it is clear that virtually there is no evidence in the eye of law in support of the plaintiff's plea that appellant had two children before the cut out date and one of the children born after the cut out date. It appears that the plaintiff and his witnesses did not inquire about the facts (like, whether defendant’s children born at hospital or not). The plaintiff did not choose to produce the documentary evidence despite his knowledge about the documentary evidence (Admission form from school), which could have been the best evidence. Plaintiff produced the documents Ex. 7 school certificate and Ex.18 survey report, which are not worth any reliance. There is no reason for not drawing adverse inference against the plaintiff for non production of best important documentary evidence. It can safely held that if the school admission forms of students named in Ex 7 would have been produced by the plaintiff, not only they might have gone against the plaintiff’s case,

but might have exposed the alleged truthfulness of Ex.7. The learned trial Judge ignored these material facts and relied upon even the evidence of AW-2 and AW-3 and Ex.18 as evidence to prove the fact that appellant had five children and one of them born after the cut out date. Therefore, the finding recorded by the trial court, if assessed, in the light of the judgment of the Hon'ble Apex Court delivered in the case of Birad Mal Singhvi Vs. Anand Purohit (supra) and judgment of this court delivered in S.B. Civil writ petition No.4553/2002-Lala Ram Vs. Civil Judge (Jr.Div.), Jodhpur decided on 26th August, 2003, it cannot be allowed to stand and deserves to be set aside. The issue is decided against the plaintiff-respondent no.1. It is held that plaintiff-respondent no.1 failed in proving that the defendant-appellant had two children before the cut out date, i.e., 27th Nov., 1995 and gave birth to child/children after 27th Nov., 1995 and was disqualified to contest the election under clause (xiv) of Sec. 26 read with proviso (e) of the Rajasthan Municipalities Act, 1959.

39. Next is issue no.4 which is relating to allegations of the wrong counting of the votes. The partly finding of the trial court on this issue is based on mis-reading of Ex. 11. The trial court proceeded on assumption that in first round, 20 votes were found

invalid and were rejected by the R.O. whereas in counting check memo Ex. 11 itself there is a column for *rejected* and *doubtful* votes and in this column it is mentioned “20-3=17 rejected”. Votes are not rejected straightway. Before rejecting votes, procedure is required to be followed as provided in the rules. Sub-rule (2) of Rule 64 of the Rules of 1994 provides that before rejecting any ballot paper the returning officer shall allow reasonable opportunity to each candidate or his agent to inspect the ballot and thereafter, shall record “rejected” on ballot paper itself with reasons for rejection in abbreviated form. This process is not dependent upon request of any candidate. The trial court wrongly held that “recounting” of 20 votes was illegal as it was done without request of any candidate. The trial court also went wrong when trial court held that “recounting of 20 invalid vote” was in violation to sub-rules 2, 3 and 4 of the Rule 67 of the Rules of 1994. Therefore, it is held that after counting of first round, plaintiff-respondent Shital Das and defendant-appellant both secured equal votes i.e., 453 each. The finding of the trial court that since plaintiff secured 452 votes and defendant secured only 451 votes, therefore, plaintiff should have been declared elected in the election cannot be sustained.

40.The plaintiff in his election petition specifically

pleaded that one vote of Amba Lal was wrongly included in the votes of the defendant Mangla Ram. In support of his this plea, the plaintiff gave his statement on oath also. The trial court accepted this ground. Plaintiff's case is supported by not only his oral evidence but also finds support from documentary evidence. Ex.12 is the counting check memo relating remaining 304 votes. Out of these 304 votes, Mangla Ram and Shital Dass both could not secure a single vote in second round, therefore, plaintiff Shital Das and Defendant Mangla Ram both had equal, 453 votes each even after final counting. In second round Ambala got 159 votes and he got 1 vote in first round, therefore, Amba Lal's votes increased from 1 to 160. Neither the plaintiff nor the defendant had any claim against Amba Lal's 160 votes. The Returning Officer ordered for recounting of the votes of only plaintiff Shital Das and defendant Mangla Ram. In chart, after recounting, votes of plaintiff have been shown 453. Therefore, no vote was available, which could have been included in the account of the defendant Mangla Ram. In the chart after recounting, votes of Amba Lal have been shown as 159 in place of 160. Amba Lal's votes were not available for recount in view of specific order of the R.O. Therefore, reduction of one vote of Amba Lal and increase of one vote of defendant Mangla Ram in the result sheet after recounting of the votes has been done

absolutely illegally. The trial court also held so and rightly held so. This illegal increase of the vote of the defendant-appellant is the foundation of final result in favour defendant Mangla Ram. When foundation goes result also goes. Therefore, order and declaration of appellant-defendant Mangla Ram as elected member from ward no.10 of the Municipal Council, Pali, by the Returning Officer is illegal and deserves to be set aside.

41. Appellant successfully proved that the trial court's finding on issue no.1 is wrong. Reasons given by the trial court for deciding issue no. 4 in favour respondent-plaintiff partly, as held above, cannot be justified. So far as finding of the trial court that one vote of Amba Lal was wrongly added in the votes of the defendant Mangla Ram is concerned, this finding is upheld. It is held that plaintiff and defendant both secured equal votes in the election in question and therefore, defendant appellant could not have been declared elected by the returning officer, hence such declaration deserves to set aside.

42. Since the issue no.4 has been decided in favour of the plaintiff-respondent by the trial court and upheld by this court, therefore, the appellant is not entitled for any relief at this stage (as both have equal votes) and cannot save his declaration as

elected candidate for the ward no.10 of the Municipal Council, Pali. In view of the sub-clause (b) of sub-section (7) of Section 44 of the Act 1959, both the counsels submitted that in case where the votes of the two candidates are found equal, then lot is required to be drawn between the those two candidates only and it is to be done by the court as there is no decision of the Returning Officer to draw the lot nor he has drawn any lot between the plaintiff and defendant.

34. In view of the above discussions, this appeal is partly allowed. Issue no. 1 is decided against the plaintiff. Issue no.4 is decided in favour plaintiff as mentioned above and election of defendant is declared void, therefore, trial court’s judgment so far as declaration of defendant’s election as void is concerned, it is upheld. Issue no. 5 became redundant otherwise also plaintiff was not entitled for declaration and the trial court wrongly declared plaintiff elected ward member for ward no.10 of the Municipal Council, Pali, therefore issue no. 5 is decided against the plaintiff. It is held that plaintiff and defendant both secured equal votes, 543 each. The addition of one vote in favour of the appellant-defendant Mangla Ram was wrong, therefore, as per sub-clause (b) of sub-section (7) of Section 44 of the Rajasthan Municipalities Act, 1949 decision

about election of the candidate is required to be taken by drawing lot between the plaintiff and defendant, who secured equal votes and for that purpose learned counsel for the parties are directed to keep the party present in court. Appeal shall remain pending for drawing lot as per sub-clause (b) of sub-section (7) of Section 44 of the Rajasthan Municipalities Act, 1949.

**(PRAKASH TATIA), J.**

C.P.GOYAL/-